RECENT DEVELOPMENTS

ANTITRUST LAW—*Proposed Consent Agreement Between General Motors Corporation and Toyota Motor Corporation*, 48 Fed. Reg. 57,246 (1983).

On December 23, 1983, the Federal Trade Commission (FTC) announced its provisional acceptance of a consent order between General Motors Corporation (GM) and Toyota Motor Corporation (Toyota) regarding the firms' proposed joint venture to build subcompact cars in Fremont, California. The consent order allowed the two companies to proceed substantially as they had planned in an earlier memorandum of understanding. The Commission's approval of the venture is significant because it may represent a substantial relaxation of antitrust standards, particularly as applied to joint ventures between competitors. If the remaining hurdles are cleared, other potential joint venturers in the United States and abroad may be encouraged to undertake similar projects.

GM and Toyota began exploratory talks on the joint venture (JV) in March 1982,[1] and they signed a memorandum of understanding on February 17, 1983.[2] The proposal quickly stirred worries of a possible violation of antitrust laws.[3] In April Chrysler distributed in Washington a 39-page memorandum outlining its objections,[4] and a Ford official testified before a House subcommittee that the arrangement would eliminate competition in small cars between GM and Toyota.[5] There was also uncertainty as to whether the United Auto Workers (UAW), which had represented workers at GM's Fremont plant before it closed, would be the bargaining agent for employees

1. Wall St. J., Mar. 9, 1982, at 2, col. 3. Similar negotiations took place between Ford and Toyota in 1981, but apparently failed when neither side could agree on what product to build. Toyota's proposal to GM, according to news reports, was essentially the same as its proposal to Ford. *Id.*

2. N.Y. Times, Feb. 18, 1983, at A1, col. 2. The text of the memorandum, with certain portions deleted, appears at 48 Fed. Reg. 57,248 (1983). The release of the memorandum by Commissioner Pertschuk was itself the subject of some controversy. Timothy J. Muris, the director of the FTC's Bureau of Competition, called it an unintentional violation of the laws against disclosing confidential information, and a Toyota official called it "irresponsible." 46 ANTITRUST & TRADE REG. REP. 4, 5 (1984).

3. *See, e.g.*, N.Y. Times, Feb. 1, 1983, at D1, col. 1; Wall St. J., Apr. 28, 1983, at 2, col. 3; N.Y. Times, Apr. 29, 1983, at D1, col. 3; Wall St. J., June 10, 1983, at 1, col. 6.

4. N.Y. Times, Apr. 29, 1983, at D1, col. 3.

5. *Id.*

of the JV when the plant re-opened for production.[6] After a long delay, caused in part by Toyota's reluctance to submit some of the necessary documentation,[7] the FTC approved the JV in December by provisionally accepting a consent order between the two companies which imposed certain restrictions.[8]

The consent order, in nine paragraphs, confines General Motors and Toyota to the general terms laid out in their earlier memorandum of understanding. Paragraph I is a list of definitions to apply in the order, and paragraphs II and III limit the scope and duration of the JV. No more than approximately 250,000 vehicles may be produced annually, and these will be sold to GM.[9] The JV may not produce vehicles for more than 12 years or in any case beyond December 31, 1997.[10]

Other sections of the order deal with the sensitive issue of communications between the two companies. No information may be

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6. Eiji Toyoda, the chairman of Toyota, had originally said that the Fremont plant's several thousand laid-off workers would have to compete with all comers for the 3000 jobs to be created. N.Y. Times, Feb. 18, 1983, at A1, col. 2. Then-UAW president Douglas Fraser, however, said that GM chairman Roger B. Smith had assured him "point-blank" that the union would represent the workers at the new plant. N.Y. Times, Feb. 18, 1983, at D3, col. 4. Smith later blamed confusion over the matter on the translation of Toyoda's remarks from Japanese to English. N.Y. Times, Feb. 22, 1983, at A13, col. 5.

The most sensitive issue in the labor talks involved seniority. GM and Toyota wanted either to avoid paying workers the full benefits to which they were entitled under previous contracts or to hire those workers who were entitled to the least. Wall St. J., June 10, 1983, at 18, col. 2. Despite a suit filed by the dissolved Fremont local against the international union, the UAW eventually gained recognition in return for concessions on the issues of seniority, work rules and job classifications. N.Y. Times, Sept. 23, 1983, at A18, col. 1. For details of the suit, which sought an injunction against any labor agreement between the union and the joint venture which did not allow members of the Fremont local to vote on the plan, see N.Y. Times, Sept. 6, 1983, at A19, col. 1; Wall St. J., Sept. 7, 1983, at 12, col. 2; Wall St. J., Sept. 8, 1983, at 23, col. 4.

7. Wall St. J., Oct. 20, 1983, at 14, col. 1. Toyota seems to have been afraid that the information might fall into the hands of its competitors if Chrysler or Ford challenged a favorable FTC ruling in court and subpoenaed Toyota's filings. The FTC might also have to share its information with the Internal Revenue Service, which has sued Toyota for cost and pricing data in federal district court in Los Angeles.

8. The text of the proposed consent order appears at 48 Fed. Reg. 57,246 (Dec. 28, 1983) (to be codified at 16 C.F.R. pt. 13) [hereinafter cited as Consent Order]. The draft FTC complaint, of which the consent order was a settlement, appears at *id.* at 57,247 [hereinafter cited as Complaint]. *See also* Analysis of Proposed Consent Order to Aid Public Comment, *id.* at 57,251 [hereinafter cited as Analysis]; Dissenting Statement of Commissioner Pertschuk, *id.* at 57,252 [hereinafter cited as Statement of Pertschuk]; Dissenting Statement of Commissioner Patricia P. Bailey, *id.* at 57,254 [hereinafter cited as Statement of Bailey]; *and* Statement of Chairman James C. Miller III, Commissioner George W. Douglas, and Commissioner Terry Calvani Concerning Proposed General Motors/Toyota Joint Venture, 48 Fed. Reg. 57, 314 (1983) [hereinafter cited as Statement of Majority].

9. Consent Order, *supra* note 8, para. II. It appears, however, that the joint venture will be allowed to produce an unspecified additional number of "products" for sale to Toyota. *Id. See also* Asian Wall St. J. Weekly, Dec. 26, 1983, at 7, col. 1.

10. Consent Order, *supra* note 8, para. III.

exchanged that is not "reasonably necessary"[11] to accomplish the legitimate purposes of the JV.[12] The order requires that the companies keep records or logs of all communications with each other or with the JV concerning the JV. These records must be kept for six years, during which time they must be available to the FTC on request.[13] GM and Toyota are further required to notify the FTC of any organizational changes in themselves or in the JV that might affect compliance with the order.[14] Finally, there is a provision for the self-executing termination of the order five years after the JV has ceased to manufacture or sell automobiles.[15]

The details of how the JV will operate are to be found not in the consent order, but in the memorandum of understanding signed earlier by the companies and attached to the draft complaint as Exhibit A.[16] GM and Toyota are each to hold a 50 per cent equity interest;[17] each will appoint half of the board of directors, and Toyota will appoint the chief management personnel.[18] The new vehicles to be produced will be derived from Toyota's new front-wheel drive Sprinter, a Corolla model, and Toyota is to retain design authority.[19]

The consent order was issued as a settlement of a complaint drafted by the FTC which charged[20] that the proposed JV would violate section 7 of the Clayton Act[21] or section 5 of the Federal Trade Commission Act.[22] Joint ventures pose particularly vexing problems under antitrust laws because it is often unclear whether participants have reduced competition in a particular market by colluding or have enhanced it by creating an additional competitor.[23] The Supreme Court first ex-

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11. Analysis, *supra* note 8, at 57,251.
12. Consent Order, *supra* note 8, para. V.
13. *Id.*, para. VI.
14. *Id.*, para. VIII.
15. *Id.*, para. IX.
16. The FTC presumably approved of the details which follow in the text, since it did not prohibit them in the consent order.
17. Memorandum of Understanding, 48 Fed. Reg. 57,248 at 57,250 (Dec. 28, 1983). News reports quoted industry sources as saying that Toyota was to contribute $150 million in cash while GM was to contribute its Fremont plant and $20 million. N.Y. Times, Feb. 15, 1983, at D5, col. 2.
18. Complaint, *supra* note 8, para. 5. Toyota has already informally named its managing director, Tatsuro Toyoda, as president and chief executive officer of the joint venture. N.Y. Times, Mar. 22, 1983, at D6, col. 6.
19. Memorandum of Understanding, *supra* note 17, at 57,248.
20. Complaint, *supra* note 8, para. 10.
21. Clayton Act § 7, 15 U.S.C. § 18. Section 7 provides that "[n]o person engaged in commerce . . . shall acquire . . . the whole or any part of the stock or . . . the assets of another person engaged in commerce . . . where in any line of commerce . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."
22. Federal Trade Commission Act § 5, 15 U.S.C. § 45. Section 5 prohibits "[u]nfair methods of competition in or affecting commerce . . . ."
23. *See generally* Note, *Applicability of Section 7 to a Joint Venture*, 11 U.C.L.A. L. REV. 393

amined a joint venture under the Clayton Act in *United States v. Penn-Olin Chemical Co.*,[24] where it stressed as a critical factor in determining the anticompetitive effect the likelihood that the parent firms would have entered the relevant market if they had not decided to form the joint venture. Joint ventures are typically justified because they produce a new product or achieve production efficiencies which would be impossible without the joint venture.[25] The unusual feature of the GM-Toyota joint venture is that it involves major competitors in the automobile market—the largest and third-largest firms respectively—who are joining to produce together what they already have the capacity to produce independently: subcompact cars. To avoid violating the antitrust laws, the parent companies and the joint venture must compete effectively—and it is precisely their ability to do so which was questioned by the two dissenting Commissioners.[26]

The most controversial aspect of the joint venture agreement is the pricing formula to be used for the JV car.[27] The initial selling price to GM is to be negotiated between GM and the JV, and is to be based on the estimated production cost. In no case is it to go beyond upper or lower limits related to the price of a comparable front-wheel drive Corolla. Subsequent price adjustments are to be made by applying a market basket index[28] to the previous year's price. If the price yielded

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(1964); Pitofsky, *Joint Ventures Under the Antitrust Laws: Some Reflections on the Significance of Penn-Olin*, 82 HARV. L. REV. 1007 (1969); Spivack, *International Joint Ventures Under the Antitrust Laws*, 40 ANTITRUST L.J. 871 (1972); Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1521 (1982); *and* Foer, *International Implications of Section 7 Enforcement*, 50 ANTITRUST L.J. 819 (1982).

24. 378 U.S. 158 (1964), *on remand* 246 F. Supp. 917 (D. Del. 1965).

25. *See, e.g.*, Statement of Pertschuk, *supra* note 8, at 57,254. It has also been noted that "[t]he combined capital, assets, or know-how of two companies may facilitate entry into new markets and thereby enhance competition, or may create efficiencies and new productive capacity unachievable by either alone." Brunswick Corp., 94 F.T.C. 1174, 1265 (1979), *aff'd and modified sub nom.* Yamaha Motor Co. v. FTC, 657 F.2d 971 (8th Cir. 1981), *cert. denied*, 452 U.S. 915 (1982).

26. *See* Statement of Pertschuk, *supra* note 8 *and* Statement of Bailey, *supra* note 8. Many of the Commissioners' objections echoed the sentiments expressed by Pitofsky in his prescient 1969 article, *supra* note 23, in which he argued that when one or both parent firms actively compete in the same market as the joint venture, coordination of competitive activity would be inevitable and should be treated under typical cartel rules. *Id.* at 1035–36. Moreover, he wrote, "active competition between a fifty-fifty joint venture and one or both of its parent firms simply does not contribute significantly to real competition in the market place." *Id.* at 1036. Brodley, *supra* note 23, wrote that in a horizontal joint venture, "the parents, through their representatives in the joint venture, will necessarily agree on prices and output in the very market in which they themselves operate." *Id.* at 1522.

27. The formula is described in detail in the Memorandum of Understanding, *supra* note 17, at 57,249.

28. The Market Basket Index is attached to the Memorandum of Understanding, *supra* note 17, as Exhibit A; certain portions have been deleted. The key sections read as follows:

> The best selling models among the subcompacts will be the models which constitute the basket. The models shall be revised at every model year on the basis of model volume in the U.S., using the latest data for the previous months . . . .
>
> The "Index" shall be the weighted average rate of wholesale price fluctuations of these

by the formula is at "significant variance" with market conditions, however, GM and the JV remain free to negotiate a more "appropriate" selling price. The dissenting Commissioners noted that as sellers of models within the market basket and as industry price leaders, GM and Toyota would largely control changes in the price index themselves.[29] Such control, it was argued, coupled with the freedom to negotiate a selling price in certain circumstances, meant that the price of the JV vehicle (which in turn was likely to be a price leader for other small cars) would essentially be a negotiated price between GM and Toyota.[30]

Although one Toyota official viewed the joint venture as aid offered to an enemy in the Japanese tradition,[31] Toyota is probably motivated by something else, too. The joint venture provides it with a low-cost way of countering protectionist sentiment by manufacturing cars in the United States.[32] Moreover, it allows Toyota, in shipping its quota[33] of automobiles, to concentrate on the higher-priced sector of the

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> models from the prior model year to the current, weighting Corolla at [deleted] % versus [deleted] % for all other comparable models combined without regard of model volumes in the U.S.

Id. at 57,250. News reports put the Corolla's weight at 30 per cent. Asian Wall St. J. Weekly, Dec. 26, 1983, at 7, col. 2.

29. Statement of Pertschuk, *supra* note 8, at 57,252–53; Statement of Bailey, *supra* note 8, at 57,255–56.

30. Statement of Pertschuk, *supra* note 8, at 57,253. Once again, Pitofsky's words seem particularly applicable; "The effect [of a horizontal joint venture] will almost certainly be that the joint venture parents, in agreeing to a schedule of prices for the joint venture, would in effect be agreeing to adopt and maintain for a period of time a mutually acceptable pricing structure on sales of their own products." Pitofsky, *supra* note 23, at 1034.

31. Shigenobu Hamamoto, vice-chairman of the board of Toyota, was quoted as calling it "offer[ing] salt to our enemy." N.Y. Times, Mar. 22, 1983, at D6, col. 5.

32. *See* Schnapp, *Behind the GM-Toyota Pact*, Wall St. J., Sept. 16, 1983, at 34, col. 4. Honda Motor Co. and Nissan Motor Co. have each spent $500 million to build plants in the U.S., but have received far less publicity than Toyota. *See* Koten, *How Toyota Stands to Gain From the GM Deal*, Wall St. J., Feb. 14, 1983, at 16, col. 3.

33. On April 1, 1981, quotas on exports to the U.S. were imposed on Japanese automobile manufacturers by the Japanese government. Although these quotas are often referred to as "voluntary," they were by no means voluntary on the part of the manufacturers. *See* DeKieffer, *Antitrust and the Japanese Auto Quotas*, 50 ANTITRUST L.J. 779 (1982) *and* Nag, *Import Limits Don't Restrain Japanese Profits*, Wall St. J., Apr. 28, 1983, at 30, col. 3. In November, 1983 the Japanese government announced its decision to extend quotas for a fourth year, limiting to 1.9 million the number of cars to be exported to the U.S. in the twelve months ending March 30, 1985. Wall St. J., Jan. 20, 1984, at 2, col. 3. In its opinion, the FTC majority noted that the quotas meant that "American consumers have fewer Japanese cars than they would otherwise desire," Statement of Majority, *supra* note 8, at 57,315 n.4, and cited as a competitive benefit of the joint venture the fact that it would "likely increase the total number of small cars available in America, allowing American consumers greater choice at lower prices . . . ." *Id.* at 57,315. Commissioner Pertschuk called this "an unacceptable exercise in second-guessing other national policies," Statement of Pertschuk, *supra* note 8, at 57,254, and Commissioner Bailey challenged the majority's prediction of increased sales, pointing to "GM's own predictions that the sales of the joint venture car will come largely at the expense of other GM and Toyota vehicles" and to GM's assumption of "no net increase in industry sales as a result of the joint venture . . . ." Statement of Bailey, *supra* note 8, at 57,257.

market where profits are greater.[34] To GM, the joint venture offers a new small car without the enormous investment required—estimated at about $1 billion[35]—and risk of developing one of its own. The FTC's majority statement further cited the "valuable opportunity" for GM to learn the more efficient Japanese manufacturing and management methods.[36]

The effects of FTC approval for the GM-Toyota joint venture may be far-reaching. It is difficult to see how the FTC could deny to other companies what it has authorized for the largest United States car producer and the largest Japanese car producer.[37] An important consideration for the FTC was probably GM's contention that learning from Toyota would make it more competitive in world markets.[38] The approval may reflect an increased willingness on the part of FTC officials to consider the international as well as the domestic impact of their decisions.[39] Defendants in future antitrust actions may thus be able to compensate for admitted harms to domestic competition by showing an increase in international competitiveness.[40] Arguments

34. *See* Nag, *supra* note 33, at 30, col. 3. One more reason cited for Toyota's participation was that it wanted a means of supplying its dealers in the U.S. if import restrictions were tightened. N.Y. Times, Feb. 15, 1983, at D5, col. 4.

35. N.Y. Times, Oct. 11, 1983, at D23, col. 2.

36. Statement of Majority, *supra* note 8, at 57,315. Commissioner Pertschuk said this assertion was "not credible." Statement of Pertschuk, *supra* note 8, at 57,252. Commissioner Bailey asked rhetorically whether "if Ford had a 30% cost advantage over GM, attributable solely to some Ford management mystique, . . . the antitrust laws [would] permit GM to learn Ford's special production techniques by jointly producing a Lincoln/Cadillac-type car[.]" Statement of Bailey, *supra* note 8, at 57,257.

37. GM controls 45 per cent of U.S. and Canadian sales. It is the largest seller of small cars in the U.S. (27 per cent of sales) and the third-largest seller of subcompacts in the U.S. and Canada. Toyota is the second-largest seller of subcompacts in the U.S. and Canada, the fourth-largest seller of small cars in the U.S., and the fourth-largest seller of all cars in the U.S. and Canada. Statement of Pertschuk, *supra* note 8, at 57,252. The two companies share 50 per cent of the U.S. market and 25 per cent of the world market. Wall St. J., June 10, 1983, at 18, col. 2.

38. *See* L.A. Daily J., Dec. 12, 1983, at 14, col. 2.

39. Antitrust litigator and former Secretary of Housing and Urban Development Carla Hills was quoted as saying that "[t]he economy has become global, and I think we're getting to the point where antitrust officials are getting a more realistic view of the market." *Id.* at 14, col. 2.

40. Paradigmatically, this defense says that even though the merger of U.S. competitors A and B will be anticompetitive in Market One, antitrust law should look the other way because new firm AB will be able to compete successfully in Market Two. *See* Foer, *supra* note 23, at 828. The set-off defense has been used and rejected in such domestic merger cases as United States v. Philadelphia National Bank, 374 U.S. 321 (1963) and in a small number of cases involving domestic and foreign markets, *see, e.g.*, United States v. Jos. Schlitz Brewing Co., 253 F. Supp. 129, *aff'd per curiam*, 385 U.S. 37 (1966). Foer notes, among other things, the irreversibility problem: what if the prediction that foreign competitors will keep competition alive proves wrong? How do we set the clock back later? Foer, *supra* note 23, at 829. There is nevertheless a thread running through antitrust law which could be used to justify such a defense: the notion that antitrust laws protect *competition*, not competitors. Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962); *cited in* United States v. Manufacturers Hanover Trust Co., 240 F. Supp. 867, 934 (S.D.N.Y. 1965) *and* United States v. F.C.C., 652 F.2d 72, 102 (D.C. Cir. 1980).

that joint ventures will have beneficial results for consumers are also likely to get a more sympathetic hearing.[41]

A number of firms will be watching to see the outcome of the proposed joint venture, and similar projects will be encouraged if it clears all hurdles successfully.[42] Both Ford and Chrysler have talked of teaming up with Toyo Kogyo Limited and Mitsubishi Motors Corporation, respectively to produce small cars in the United States,[43] and the effect will not be limited to the automobile industry.[44] While it appears that the FTC will not oppose such future joint ventures in principle, the ventures will probably have to be carefully structured and of limited range—as is the GM-Toyota venture—if they are to be permitted.

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